ADEPT

LEGAL COMMENTARIES
PARTY LEGISLATION: QUO VADIS AND HOW?

Sergiu Grosu, November 30, 2007

The "revision of legislation on political parties accordingly to European norms"[1] is one of legal actions that the Republic of Moldova should take in line with the Resolution and Recommendations by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (CoE). The Parliament has pledged to honour this commitment by the end of the 2006 summer session, accordingly to the political consensus. But the speaker acknowledged at the end of the 2007 summer session that this commitment was not honoured, and promised that it would be tackled and fulfilled by the end of this year. As 2008 is a pre-electoral year, the Parliament was expected to approach the modification of the legislation on political parties, trying to adopt new regulations in this area. But what will be the new regulations, will they envisage the examination of the 2006 draft only or an ampler legislative package, these are questions that both the governors and the opposition will have to answer as soon as possible. Given the complexity of the problems, ample and appropriate answers are recommended.

I. Evolution of legal-normative framework

A short summary of evolutions regarding the existing legal framework and modification processes is required before assessing the advantages and disadvantages of the draft law from the priority agenda of the Parliament.

1. Law # 718-XII from 17.09.91concerning parties and other social-political organisations

The document regulating the principles of building, functioning and dissolution of parties and other social-political organisations (hereinafter *parties*) was adopted much time before the enforcement of the new Constitution of the country. Although it has undergone 12 modifications, the law is out-of-date and does not comply with modern standards, requirements and criteria in the area, in particular:

- The Constitutional Court has examined many norms of the law[2];
- A series of regulations are regarded as restrictive and contrary to European democratic standards[3];

- Many contradictions occur when authorities apply this law, some interpretations affect the freedom of political association, other related rights[4];

- International institutions recommend insistently the revision of the Moldovan legislation on parties[5].

2. Relevant decisions by Constitutional Court

A. Under Decision # 37 from 10.12.98 concerning interpretation of Article 41 (1) of the Moldovan Constitution, the Constitutional Court ruled as follows:

- The Constitution does not obstruct the voluntary association of citizens into parties and other social-political organisations, but every political association of citizens (party or social-political organisation) must obtain a status of legal entity, in order to honour the goal for which it was created;

- The establishing of additional criteria resulting from the goal of building political associations – gaining the power – is not excluded. In this respect, the legislator could establish other criteria for registration of a political party as regards the mode of building, the goal of building, the existence of a patrimony, of an independent structure, registration of party, respect for the representation principle;

- The representation principle does not contravene to the constitutional freedom of association of citizens, but it could be unconstitutional if its effects suppress the right to association or if it produces suppressing effects;

- The legal regulation of the mode and conditions of participation of parties and other social-political organisations in elections is based on provisions of an organic law accordingly to Article 72 (3) (a) of the Constitution.

B. The Constitutional Court concludes in the Decision # 3 from 29.01.99 concerning the control on constitutionality of some provisions of the Law # 146-XIV from September 30, 1998:

- The establishing of the numerical criterion of representation of parties rests with an organic law, that means with the discretion of the Parliament, and the Court cannot examine it as long as its effects do not suppress the political pluralism principle stipulated by Article 1 (3) of the Constitution;

- Article 41 (2) of the Constitution stipulates that parties and other social-political organisations are equal in front of the law, that means parties must not be discriminated when they are created, they are ensured optimal conditions for an efficient work aimed to accomplish the statute-related goals;

- The introduction by the law of a term for a new registration of political parties accordingly to the new legally imposed requirements does not discriminate parties.

C. The Constitutional Court adopted on June 3, 2003 the Decision # 11 on control of constitutionality of some provisions of the Law # 718-XII from September 17, 1991 "Concerning parties and other social-political organisations," noting as follows:

- The introduction of a minimum number of party members in 2nd-level administrative territorial units needed for the registration of a party meets the constitutional norms, given the representation criterion which rests with the discretion of the legislature;

- The record measures and responsibilities imposed to decision makers of parties, the presentation of reports to some public institution by these persons, and the collection of signatures of party members do not restrict the freedom of association into parties guaranteed by Article 41 (1) of the Constitution;

- The provisions requiring the registration of membership of a party or other social-political organisation meet the supreme law;

- The Parliament cannot extend the dissolution requirements as a form of sanctioning political parties over constitutional norms strictly delimited by Article 41 (4), and political parties and other social-political organisations can be liquidated only accordingly to Article 41 of the Constitution and with the notification of the Constitutional Court;

- If Article 41 (4) of the Constitution is violated, the measures taken to prohibit or forcedly dissolute political parties will be considered exceptional and accordingly to the proportionality principle stipulated by Article 54 (4) of the Constitution.

3. Draft law on parties and other social-political organisations (2000).

On August 2, 2000, the Government approved and delivered to the Parliament for examination the draft law on parties and other social-political organisations[6] worked out by the Ministry of Justice with the support of independent experts and specialised international organisations (IFES Moldova, USAID). The draft contained 59 articles structured into 8 chapters, with essential innovations including more detailed regulations on party building procedure and norms on funding of parties, financial control and transparency of financial activity. This document was adopted in the first reading in late 2000 and the Council of Europe examined it later[7]. The final examination of the document was suspended because of the political conflict in early 2002 and negotiations between the Government and the opposition (within the Roundtable). Further, in the virtue of the 2005 parliamentary elections, the parliamentary majority avoided approaching problems capable to give birth to political controversies. The

perspectives of resuming the examination of this draft were unclear. In all likelihood, the Parliament abandoned the idea to examine it, though it had earlier accepted this document in principle.

4. Civil Code (2003)

The new Civil Code, which contains norms on non-commercial organisations in the Section 5 of the Book I, entered into force on June 12, 2003. The Code attributes the political parties to a form of these organisations – the *association* (Article 181 (2) of the Civil Code), but it allows *the law* (Article 181 (6) of the Civil Code) to establish the particularities of constitution, functioning and legal status of various associations. However, the general norms of the Code must find an adequate coverage in this legislation and, therefore, a new law on parties must contain special and clear norms concerning:

- The statute of the organisation (including the name, domicile, date of birth, citizenship, and other data from identity acts of founders);
- Conduct of economic activities (statutory or additional);
- Conflict of interests and ways to settle it.

Of course, these provisions cannot be expressed in diverse formulations, with the legislator enjoying a quite large field of manoeuvre, and this is an extremely important thing under the domination of a parliamentary majority with specific preferences, and they are formulated in the new law on parties.

5. Draft law on financing of political parties and electoral campaigns (2005)

Accordingly to the Legislative Programme for 2005–2009, the Parliament has pledged to examine in 2006 a draft law on financing of political parties and electoral campaigns (this being a priority against corruption). The Government had also pledged to ensure the elaboration and promotion of this document by including it in the National Programme on Implementation of the Moldova-NATO Individual Partnership Action Plan[8]. The Ministry of Justice has worked out a special draft law aimed to regulate the financing of parties in general and during electoral campaigns, with the draft containing regulations concerning the control on funding, restrictions (interdictions) and sanctions for violation of legal norms in the field[9]. The Government approved the document on autumn 2005 and delivered it to the Parliament. However, the legislature did not adopt it in the due time, and it seems that it gave up the examination of this document without revealing the reasons.

II. Draft law on political parties (2006)[10]

Several lawmakers representing the Communist and Christian Democratic factions tabled a new draft organic law on political parties in late 2006, and the document was conceptually examined and approved through an urgent procedure without preliminary public debates[11]. Just on spring 2007, after the

CoE has examined the draft, an ampler and in-depth debate on this document was organised as part of a conference held with the support of the CoE and OSCE, with the participation of developers of the initiative from the parliamentary agenda and other interested subjects[12]. Paradoxically, the topic did not raise a special interest among extra-parliamentary political parties, with their participation in debates being anaemic. Nor even parliamentary parties, except for developers, proved initiative and activism in debating the document, with most of objections and proposals coming from CoE experts and nongovernmental organisations.

Essential provisions of the new draft law[13] envisage:

- Restrictions for parties (Article 3);
- Competences of political parties (Article 4);
- State support (Article 5 and others);
- Record of parties (Article 12);
- Obligations and responsibility, including the obligation of holding general assemblies and updating the lists (Article 20);
- Reorganisation, suspension and cessation of activity, including for inactivity (Chapter 5);
- Patrimony and funds (Chapter 7).

The main innovation of the draft is the inclusion of new provisions on financing of political parties from state budget besides regulation on creation, registration and work of parties.

Shortcomings of the draft and criticism against this document

The document was worked out in a hurry, without taking into consideration the previous objectives and proposals regarding the regulation of this field. Thus, international and national experts reiterated the old shortcomings and signalled other faults such as the shortage and imperfection of regulations on financing, transparency, responsibility, correlation between diverse legal acts of the same level.

a) Opinions by CoE experts[14]

According to expertises by the CoE secretary-general and the Venice Commission, the draft law is an "important step forward", a document providing the "opportunity to build a modern party funding system and to enhance transparency and responsibility as regards the financing of parties." At the same time, CoE experts indicated many provisions that should be improved, as well as matters unregulated by the new document. The shortcomings and objections envisage general regulations (creation, registration, functioning and dissolution of

parties) and special regulations (financing, control on activity and use of funds, transparency and responsibility, etc.).

General shortcomings:

- A short and general communication is attached to the draft without an adequately explained memoir[15];
- The restrictions on activity of parties (Article 3) are too severe and they do not fully meet the European Convention for the Protection of Human Rights (ECPHR), affect the fundamental democratic principles[16];
- The orders allowing the 'citizens of the Republic of Moldova" and banning foreigners and stateless people to join political parties are restrictive and contrary to the CoE standards[17];
- Article 9, which imposes political parties to have at least 5,000 members in order to get registered (including at least 150 residents of 2nd-level territorial units) are excessive compared with thresholds in democratic countries in West Europe. These norms harden the freedom of association (Article 11 ECPCH)[18];
- The provisions of Article 9 requiring data on party members and Article 20 requiring the periodical updating of these data are disproportional with the standards accepted by the Venice Commission[19].

Objections and shortcomings regarding funding, control, reporting, transparency:

- Article 27 contains internal contradictions because it allows parties to own certain goods and on the other hand bans the economic and commercial activity without appropriate explanations (publishing for itself and others)[20];
- The provisions of Article 28 which exempt some incomes from taxes may produce difficulties and misinterpretations; these problems must be remedied through additional elaborations and concomitant modification of the fiscal legislation[21];
- Stipulations forbidding foreign financing (Article 28) must be essentially clarified because they are able to limit the rights of Moldovan citizens from other countries and this would be a violation of Article 11 of ECPHR[22];
- Article 28 does not clearly explain the funding restrictions for some public entities (state institutions and foundations, municipal enterprises). Also, it does not ban the contributions on behalf of others (the so-called "laundered" contributions)[23];
- The draft law must be completed and seriously amended as regards[24] a better internal control; sanctions for violation of rules on functioning of parties and electoral campaigns; independent monitoring (by CEC, etc.);

reporting; illegal expenses; prohibited funds; external appeals (media, citizens, etc.); control on financial reports and state budget funding, etc.

b) Other essential shortcomings of the draft[25]:

1. The draft was unfairly elaborated and promoted in the first (conceptual) reading, without preliminary public debates. The argumentation and communication attached to the draft are insufficient and superficial, which means that the elaboration was not preceded by scientific investigations regarding political, social, economic, financial, legal, other consequences of the regulations.

2. The document lacks an economic-financial ground, though the new regulations require very large founds in order to be enforced. The lack of a ground reveals a formal approaching of financial aspects, while the budgetary funding is considered the main innovation of the draft.

3. The text of the draft does not fully comply with the legislation in effect: the Civil Code (regarding the definition of parties as private legal entities without a lucrative goal), Electoral Code (regarding the CEC status and competence, rights of parties during electoral campaigns, financial and material matters, etc.); Tax Code (record of funds, reporting, facilities), and others.

4. The criterion "*of administrative territorial organisation of a party*" is vaguely formulated, and the level of administrative-territorial organisation (national/republican, 1st or 2nd level) is not specified.

5. The draft does not stipulate the functioning of regional parties, while the administrative territorial organisation of Moldova admits the regional level (ATU Gagauzia and Transnistria).

6. Provisions of Article 2 (2) harden the functioning of leading bodies, branches and structures of political parties in the Transnistrian region because this territory is not "*under the jurisdiction of the Republic of Moldova.*" On the other hand, the law admits the existence of *branches*, but it does not stipulate the creation and functioning of these entities.

7. Article 2 (3) stipulates some interdictions regarding the creation of "*structures*" and "*bodies*" of political parties "*within institutions, enterprises and organisations,*" without making clear inherent aspects: – what do "structures and bodies" mean (officialised entities with pre-established competences or simple political groups); – any enterprises, institutions and organisations (public, private, with or without legal entity) are envisaged; – the formula "within" means building officialised structures and bodies as part of structures and bodies of political parties in the territory (in headquarters) of these entities, etc.).

8. The draft does not stipulate express important principles regarding the functioning of party such as *legality, transparency, independence, self-administration, gender equality*.

9. Norms and notions from Articles 3 and 24 ("*democratic values*", "*rule of law*", "*ideas running counter the Constitution*") are capable to limit political rights, the freedom of association and expression, a fact signalled by CoE experts, but developers neglected the relevant ECHR jurisprudence[26] when they worked out the draft.

10. Article 4 (3) will be applied on "*political alliances*" which are also envisaged by Article 14 (1) (i) of the draft, but the law does not regulate their creation and legal status (the Moldovan legislation does not regulate these matters in general).

11. Article 7 (4) is equivocally formulated, the interdiction it refers to (participation in political events) may be temporary; it does not establish a concrete connection between interdiction and exercising of a public position. It does not clearly indicate the positions for which the membership to a political party is prohibited, and this is a serious omission.

12. The last paragraph from Article 10 awards pretty wide discretionary attributions to the Ministry of Justice:

    - It lacks *express grounds* to demand the annulment of the registration (for example, forgery of signatures of members);
    - It lacks a *concrete term* when the annulment of registration can be demanded;
    - It does not stipulate the *right to further remedy* problems and obstacles;
    - Now the annulment of registration may be sought for *minor reasons* (some provisions which, accordingly to functionaries, obstructed the registration, are discovered in the programme or statute; some errors are discovered in the declaration on party headquarter; some signatures by party members are withdrawn and the minimum number is lower than stipulated by law, etc.).

13. In order to ensure transparency and a plenary access to public information, some provisions must be introduced in Article 12 to explain the information from the register of political parties kept by the Ministry of Justice (as for example: name; registration decision; headquarters; leader and his contact details; statute and programme of the party; international affiliation, etc.). The law would stipulate that the information from the register must be published on the website of the Ministry of Justice within a certain term.

14. In order to enhance the responsibility and ensure an adequate control inside the party, the law should oblige parties to indicate the following provisions in the statutes: - *concerning internal control (auditing)* (on management of funds and patrimony); – the *structure in charge with control* (auditors, financial officers) and the creation of this structure, prevention of conflicts of interests; – *rights of members to be informed* (anytime) about revenues and expenses of the party.

15. Article 25 stipulates the possibility to demand the dissolution of a political party because the "*goal or activity of the party has become illicit or contrary to the public order*", with this formula allowing abusive interpretations and applications (any insignificant violation of public order is contrary to the public order). According to the article, the dissolution is allowed if "the *party follows another goal than the one stipulated by its statute and programme,*" and this fact bans a temporary, minor, non-dangerous goal because it is not formally indicated in the statute or programme of the party.

16. Article 28 concerning funds of political parties must be modified and completed, so that to enhance the responsibility of parties, facilitate the legal activity and prevent and combat eventual violations:

    - The possibility to raise funds from *bank credits and interests, sales of party goods, rent of own spaces*;
    - The party statute must regulate the "*use*" of the membership fees;
    - Collection and payment operations cannot pass via *accounts in foreign banks* (with a major foreign capital) even if they are based (representations, branches) in Moldova;
    - The ban of foreign funds for parties must also cover the funding by joint enterprises, by foreign citizens in Moldova (with a permanent or temporary stay permit); the draft must clarify the funding of parties by individuals and legal entities from the region uncontrolled by Moldovan authorities (Transnistria);
    - Completions are required to oblige parties to report their funding every year.

17. Article 32 (1) introduces additional requirements on budgetary funding, but they are useless or even abusive, since once succeeding to the Parliament, parties honour the following conditions: *registration as an electoral contestant* (independent or electoral bloc), *succession of electoral threshold* (only those succeeding the threshold can hold mandates), *organisation into parliamentary factions* (it is presumed because otherwise the party loses many advantages linked to the parliamentary activity).

18. The regulation of Article 32 (1) obliging parties to hold at least 20 mandates in district councils (of 2nd level) is inadequately formulated. Thus, a party holding tens and even hundreds of mandates in local councils of villages and cities, tens/hundreds of mayoral mandates will be deprived of budgetary funding because it was not active during elections in district councils, which are a medium, intermediary chain of local public administration.

19. In order to improve the prevention and fight against money laundering, Article 29 shall be completed with provisions which:

    - Prohibit parties to receive donations from persons who are not allowed to cast their ballots;

    - Ban parties to receive donations from gambling businesses (casinos, lotteries, bets, etc.); prohibit or limit the financial donations by associations, foundations and trade unions;

    - Limit cash donations at a certain amount, while larger amounts will be donated via appropriately registered financial institutions;

    - Describe donations as public information available to any interested person. These donations must be estimated accordingly to their market value;

    - Oblige parties to publish general reports on their incomes and expenses in Monitorul Oficial.

- Article 33 must be completed as follows:

    - To limit the use of state budget allocations for (considerable, excessive) remuneration of party members, in particular, of members of leading bodies of parties;

    - Provisions concerning "*personnel expenses*" and "*expenses for organisation of political activities*" are unclear and incapable to prevent negative practices of abusive distribution of funds between party leaders;

    - External control on use of state budget funding (which may be exercised by the Ministry of Justice or Ministry of Finance);

    - The article must oblige parties to periodically report the use of state budget allocations.

- In order to modify the existing provisions and approve new amendments, the electoral legislation must be revised at the same time with adoption and enforcement of the law, so that:

- To regulate the financing of electoral campaigns of parties from state budget;
- To ban the use of funds (from budget or own) in order to bribe electors, to hold charity actions during electoral periods;
- To limit the use of administrative resources by electoral candidates, parliamentary political parties, which enjoy more advantages than other parties (have a priority access to public mass media, receive rooms for meetings, enjoy access to technical means).

- The draft does not regulate enough the aspects regarding the accordance of acts and activities of existing parties with the new legal regulations. The formula from Article VI, which says that "*political parties registered in the Republic of Moldova will adjust their documents on constitution and functioning and work to this law"* by a certain date is too general and ambiguous, and therefore, the final and transitory regulations must essentially develop by taking into account the detailed description of all matters: legal, temporary, organisational-institutional, financial, etc.

III. Conclusions

Now the legislation lacks common or consensually accepted approaches regarding:

- The minimum number of members needed to create a party;
- The plenitude of data on members that must be presented for registration and permanently preserved by the Ministry of Justice;
- The annual or pre-electoral updating of the number of members and emerging consequences;
- The dissolution of a party for inactivity;
- The distribution of state budget funds (accordingly to former or future general or local electoral performances; number of voters; number of members, and others);
- Constitution and rights of political and electoral alliances/blocs;
- Re-registration of all parties after enforcement of the new regulations, etc.

Thus, in spite of concerns of foreign experts and international organisations regarding additional requirements for registration and functioning of parties, the Constitutional Court of Moldova does not observe any problems in establishing such requirements (representation, presentation of personal data, re-registration).

At the same time, the dissolution of parties on inactivity reasons is a form of dissolving a party, and the Constitutional Court had earlier noticed that the Parliament does not have the right to extend the dissolution conditions as a sanctioning of political parties over strictly delimited constitutional limits stipulated by Article 41 (4).

The draft from the Parliament's agenda could help develop the political party system in Moldova, but the initial version of this document raises many questions, leaving room for abusive interpretations, and it does not introduce enough mechanisms to prevent and combat frauds.

Including the regulations on creation and functioning of parties and norms on funding of parties into a single document and omitting detailed aspects on financing of electoral campaigns is not argued. Discordances with the Election Code and Tax Code will permanently emerge, challenging litigations that the norms of this draft will be incapable to settle. Therefore, the law on political parties and the law on funding of political parties and their electoral campaigns must be separately elaborated and examined.

In order to prevent accusations of political favouritism and retroactive application of the law, which privilege the acting parliamentary parties, the new provisions on funding of political parties from the state budget should be enforced after the next general elections (the 2009 parliamentary elections).

The regulations on bookkeeping, control and audit of financial and material means of parties, their circulation and use must be described in details, without allowing equivocal interpretations. At the same time, the sanctions for violations in this area should be strictly and clearly regulated, and these breaches should be clearly formulated.

The competence of the Central Electoral Commission in this field must be widely approached and we subscribe to the opinion by a CoE expert that the Commission should be awarded additional rights, including to perform the audit or demand it, to work out and impose specific regulations on financing and financial audit.

Abuses during funding campaigns reduce the credibility of the democratic system, deep the distrust of electors towards functioning of this system for sure. Statements on reformation of the electoral funding system should be followed by real proposals and tested and efficient mechanisms. However, these mechanisms are uncomfortable for those falling under the incidence of these regulations and ruling parties or parties with a certain rating experience the discomfort, so that the reformation is only mimicked.

[1] PD # 284/11.11.2005, Article 3 of the Annex
[2] Constitutional Court Decisions # 37 from 10.12.98; # 3 from 29.01.99; # 11 from 03.06.2003

[3] Commentaries and notes by CoE experts, reports by the Committee on the Honouring of Obligations and Commitments by CoE Member States (report from 14.09. 2007, Doc. 11374)
[4] ECHR judgment on "CDPP vs. Moldova" from 14.02.2006; Trial between the Ministry of Justice and the European Action Movement regarding the registration of this social-political organisation; litigations concerning changes in the structure and leadership of parties (Republican Party, Social Liberal Party, etc.)
[5] CoE Resolution # 1465 (2005); CoE Resolution # 1572 (2007)
[6] GD # 780 from 02.08.2000, draft registered in the Parliament under the number 2834 from 04.08.2000
[7] Doc. SG/Inf (2002) 34 from 11.09.2002 (CoE experts J.Hamilton and I.Ziemele)
[8] GD # 1506 from 29.12.2006, objective 1.3.2
[9] The draft is available at www.justice.gov.md, the column "Elaboration of normative acts"
[10] Draft registered in the Parliament under the number 4860 from 20.12.2006 (available at www.parlament.md/lawprocess/1rstreading/)
[11] The draft was published on the website of the Parliament on December 22, 2006 and adopted in the first reading on December 28, 2006, while the Parliament Regulation stipulates maximum 30 days for examination and conceptual proposals and the mechanism of cooperation between legislature and civil society grants at least 15 days for reception of initiatives and objections on any draft law
[12] The conference "Promoting the transparency and responsibility of political parties in Moldova", May 22–23, 2007
[13] They envisage the principles and norms which are not stipulated by the effective legislation or are generally, superficially or ambiguously stipulated
[14] Commentaries by M.Walecki (25.02.2007) and H.Vogel (CDL (2007) 013, – Opinion # 431 from 19.04.2007) regarding the draft law on political parties of Moldova
[15] Opinion # 431 (4)
[16] Opinion # 431 (6)
[17] Opinion # 431 (7)
[18] Opinion # 431 (8); Commentaries by M.Walecki, p.2.10.1–2.10.4
[19] Opinion # 431, p.9
[20] Opinion # 431, p.11
[21] Opinion # 431, p.12
[22] Opinion # 431, p.13
[23] Commentaries by Mr. M.Walecki, p.2.6.1–2.6.3
[24] Opinion # 431, p.5; Commentaries by Mr. M.Walecki, p.2.1–2.8
[25] Including assessments from independent expertises on this draft (corruptibility survey: www.capc.md), ADEPT commentaries, observations by mass media, etc.
[26] The ECHR Judgment from 25.05.1998 "Socialist Party and Others vs. Turkey", p.47; the ECHR Judgment from 30.01.1998 "United Communist Party of Turkey vs. Turkey"; the ECHR Judgment from 12.11.2003 "Socialist Party and Others vs. Turkey"